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**IN THE  
COURT OF APPEALS OF INDIANA**

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JAMES DRAIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0705-CR-392
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Sheila Carlisle, Judge  
Cause No. 49G03-0609-FB-179320

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**DECEMBER 6, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SULLIVAN, Senior Judge**

## STATEMENT OF THE CASE

Defendant-Appellant James Drain appeals his jury trial convictions of rape, a Class B felony under Count I, and criminal deviate conduct, a Class B felony under Count III. We affirm in part and remand with instructions.

## ISSUE

Drain raises two issues for our review, which we consolidate and restate as: Whether the State presented sufficient evidence to support Drain's convictions.

## FACTS

The pertinent facts most favorable to the two convictions are as follows:

C.H. exited a Pike High School bus and began walking to her house. Drain came up behind C.H., touched both her arms and said something, but C.H. could not tell what was said. Drain placed both hands on C.H.'s arms and then pushed her into a nearby shed. Drain shut the shed door and proceeded to pull down C.H.'s pants and her underpants. C.H. told Drain that she needed to go home, but Drain ignored her. Drain pulled his pants down and told C. H. to turn around and bend over. An anal sex act then occurred and C.H. testified she was "scared" and that she cried. (Tr. at 27). Drain then told C.H. to lie down on what proved to be a slightly raised metal or "camp" table. He got on top of her and had vaginal intercourse. When C.H. again said she had to go home, Drain stated, "Five Minutes." (Tr. at 30). Drain then repeated the anal and vaginal sex acts before leaving the shed.

C.H. dressed, picked up her book bag, and still crying, walked home and called her mother at work. Her mother came home, along with C. H.'s stepfather. C.H. was

then taken to St. Vincent Hospital in an ambulance, where she was examined. During the trial, C.H. testified that she did not engage in anal or vaginal intercourse “willingly.” (Tr. at 37).

### DISCUSSION AND DECISION

Before discussing the sufficiency of the evidence issue, we address the manner in which the trial court sentenced Drain. In addition to the guilty verdicts on Counts I and III, the jury found Drain guilty of two counts of sexual misconduct with a minor, as Class C felonies under Counts V and VI. In addition to entering judgments of conviction upon Counts I and III, the trial court entered judgments upon the two jury verdict convictions of sexual misconduct with a minor. However, the State and the defense both agreed that Count V would “merge” with Count I, and Count VI would “merge” with Count III. (Tr. at 250). Accordingly, the court did not impose sentences upon the latter two offenses.

We note that the so-called “merger” of offenses is inadequate and that the judgments of conviction upon the two sexual misconduct with a minor verdicts must be vacated. See Morrison v. State, 824 N.E.2d 734 (Ind. Ct. App 2005), trans. denied; Carter v. State, 750 N.E.2d 778 (Ind. 2000).

Drain challenges the convictions for rape and criminal deviate conduct, arguing that the State failed to prove that the fifteen-year-old victim, C. H., was compelled to submit by “force or threat of imminent force” as required by Ind. Code § 35-42-4-1 and

Ind. Code § 35-42-4-2.<sup>1</sup> Because of the focus of Drain's appellate argument, we need not discuss whether or not sexual vaginal and anal intercourse took place. Those matters are not in issue. Suffice it to say that there was ample evidence that the sex acts took place.

Drain concedes that the element of force need not be physical or violent and that the assessment of the evidence is done from the perspective of the victim. Tobias v. State, 666 N.E.2d 68 (Ind. 1996). We hold that the evidence recited herein supports the verdicts of the jury. C.H.'s testimony is sufficient to show that she was forced into the shed and then forced to engage in sexual acts against her will. Stated differently, the jury reasonably concluded that C.H. was compelled by what she perceived as a threat of imminent force if she failed to comply with Drain's demands. Although a different jury might have concluded otherwise<sup>2</sup>, we are unable to say that the verdicts in this case on the rape and criminal deviate conduct charges are contrary to law.

### CONCLUSION

The judgments of conviction on Counts I and III are affirmed. As earlier noted, however, we remand to the trial court with instructions to vacate the judgments of conviction entered upon counts V and VI concerning sexual misconduct with a Minor.

Affirmed and remanded with instructions.

BARNES, J., and BRADFORD, J., concur.

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<sup>1</sup> Drain also argues that because he reasonably believed C. H. to be over the age of sixteen, such belief negates culpability for the crime of sexual misconduct with a minor under Ind. Code § 35-42-4-9. Because we are ordering the two judgments of conviction for sexual misconduct with a minor to be vacated, we need not address this argument.

<sup>2</sup> There were several inconsistencies in C. H.'s testimony.